CPR-11 DME-11

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Canadian Pacific Railway Company, et al. -- Control -- Dakota, Minnesota & Eastern Railroad Corp., et al.	)	Finance Docket No. 35081

APPLICANTS' REPLY IN OPPOSITION TO KANSAS CITY SOUTHERN RAILWAY COMPANY'S MOTION TO COMPEL THE DEPOSITION OF KATHRYN MCQUADE

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Dated: February 19, 2008

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Pursuant to the Board's regulations at 49 C.F.R. Part 1114 and other applicable discovery rules, Canadian Pacific Railway Company ("CPR"), Soo Line Holding Company ("SOO Holding"), Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"), and Iowa, Chicago & Eastern Railroad Corporation ("IC&E") (CPR, SOO Holding, DM&E and IC&E are referred to collectively herein as "Applicants") hereby submit this Reply to Kansas City Southern Railway Company's ("KCS") Motion to Compel the Deposition of Kathryn McQuade (the "Motion to Compel"). KCS has failed to carry its burden of proof. Therefore, its Motion to Compel should be denied and the Board should issue a protective order quashing KCS' notice of deposition of Ms. McQuade.

I. FACTS AND BACKGROUND

KCS' motion mischaracterizes both the facts and Applicants' legal arguments, and compounds its misstatements with the scurrilous and wholly unsupported suggestion that CPR may have exercised unlawful control of DM&E. An accurate understanding of the facts, the evidence, and CPR's actual position on the law is essential to proper evaluation of KCS' Motion to Compel the deposition of CPR's Executive Vice President and Chief Operating Officer, Kathryn McQuade.

A. The Facts

KCS' claim that CPR is somehow responsible for KCS' failure to pursue discovery in a timely manner is not credible. As CPR explained in its Motion for Protective Order, CPR and DM&E filed the original control Application – which included the verified statements of Messrs. Foot, Schieffer, and Williams – on October 5, 2007. Nothing prevented KCS from seeking discovery starting in October 2007. Moreover, CPR filed its full perfected Application on December 5, 2007. Any and all issues that KCS now claims are presented by the Application were therefore known, or should have been known, to KCS in early December at the latest. Further, when the Board issued a decision accepting the Application and adopting a procedural schedule to govern this proceeding, it gave express notice to parties that "discovery may begin immediately." *See* December 27 Decision at 10 For four months (from October through early February), however, KCS gave Applicants no notice that KCS wished to take the deposition of Applicants' witnesses (much less Ms. McQuade).

KCS' suggestion that it elected not to commence discovery until less than two weeks ago because DME somehow had led it to believe that it would accede to KCS' wish to extend certain agreements between KCS and IC&E is both factually incorrect and legally irrelevant. *See* KCS Motion at 14-15 (claiming that "Applicants may have adopted their apparent bait-and-switch tactics as a device to prevent KCSR from being able to fully pursue a remedy at the Board"). KCS proffers no evidence whatsoever to support this assertion. Moreover, KCS' assumption regarding its prospects for success in obtaining concessions from DME does not excuse KCS' failure to pursue discovery in timely fashion. *See Illinois Central Railroad Company – Petition for Crossing Authority*, STB Dkt. No. 33877 (Sub-No 1), Decision (Nov. 20, 2001) (Board quashed KCS' eleventh-hour request for depositions of witnesses who had submitted verified statements, rejecting KCS excuse that it did not seek discovery earlier because it was waiting for

the Board to rule on KCS' motion to dismiss, and finding that "[t]he pendency of its motion to dismiss . . . did not preclude KCS from seeking discovery against IC. KCS merely chose to wait.").

KCS' further assertion that CPR "inserted itself into . . . discussions," KCS Motion at 14. regarding KCS' proposal to extend its agreements with DME is belied by the evidence. As the correspondence attached to Applicants' Motion illustrates, it was KCS that attempted to bring CPR into those discussions by requesting CPR's concurrence with a KCS proposal for the extension and modification of its commercial agreements with IC&E. *See* KCS Letter to CPR (Jan. 25, 2008) (Ex 2 to Applicants' Motion for Protective Order). CPR responded promptly, delivering a letter four days later explaining that, both as a matter of law and as a matter of prudent business planning, KCS' request to CPR for extension of the KCS/IC&E contracts was premature. *See* CPR Letter to KCS (Jan. 29, 2008) (Ex. 3 to Applicants' Motion). Notwithstanding CPR's unequivocal response, KCS waited nearly two more weeks before it served notices of deposition for three persons who filed verified statements in support of the Application and for CPR's Chief Operating Officer, Kathryn McQuade. KCS has no one but itself to blame for its failure to seek depositions in a timely manner.

Finally, KCS' claim that it offered to take Ms. McQuade's deposition "anywhere," or at any time between February 15 and February 28, is likewise inconsistent with the record. KCS's notice to Ms. McQuade explicitly demands that she appear for her deposition in Washington, D.C on February 21, 2008. *See id,* Ex. 1 to Applicants' Motion for Protective Order. KCS' deposition notice violates the Board's rule that depositions be taken in the city where the deponent is located, *see* 49 C.F R. § 1114.23(a)[1], and warrants denial of its motion to compel that

[1] It was only after CPR counsel pointed out to KCS counsel the requirements of

deposition. Despite the difficulty of scheduling depositions on such short notice, Applicants worked diligently to accommodate KCS' tardy requests, and ultimately have been able to make the other three witnesses available – two in the week sought in the notices, and one the following week.

B. KCS' Mischaracterization of CPR's Legal Arguments

Rather than responding to Applicants' arguments for a protective order, KCS' motion to compel relies primarily on criticisms of straw man arguments not raised by CPR, and on KCS' newfound desire to pursue new subjects of inquiry with Ms. McQuade that were not mentioned in its deposition notice. Contrary to KCS' claim, Applicants have not asserted that "non-testifying witnesses" "cannot be deposed," or that non-witnesses enjoy "categorical immunity from deposition." *See* KCS Motion at 6. Rather, Applicants contend that, among the many reasons why KCS should not be permitted to depose Ms. McQuade at this late date is the fact that Ms. McQuade did not submit a verified statement in support of the Application, and was not personally involved in the negotiation of the proposed transaction or the preparation of the Application. *See* Applicants' Motion at 4. The facts that a proposed deponent did not submit a verified statement, and that others (including witnesses that KCS is scheduled to depose) have more direct and complete knowledge of matters that KCS purports to be interested in pursuing in depositions are entirely reasonable and appropriate factors for the Board to consider in determining whether to allow KCS to depose Ms. McQuade.

Nor has CPR argued that an "upper executive privilege" – a term coined by KCS – should preclude Ms. McQuade's deposition. If this were Applicants' argument, it would apply with at least equal force to two other witnesses whom Applicants have agreed to make available

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Section 1114.23(a) that KCS conceded it would be required it to travel to the location of the witness.

for deposition by KCS, namely DM&E's President Kevin Schieffer and CP's Vice President, Marketing and Sales (Merchandise), Ray Foot. What Applicants contend is that a number of factors—including KCS' unreasonable demand that a very senior officer of CPR (who has not been significantly involved in the transaction or this proceeding) appear for deposition at this late date and upon such short notice—together forcefully argue for denial of the Motion to Compel.

Finally, the subjects upon which KCS' Motion indicates that KCS seeks to compel Ms. McQuade's testimony were not mentioned in KCS' deposition notice. Rather, those subjects are introduced for the first time in KCS' Motion.[2] KCS' improper attempt to use its Motion to broaden substantially the scope of its inquiry of Ms. McQuade is a further reason to deny that Motion

II. ARGUMENT

The party seeking to compel discovery has the burden of showing the discovery it seeks is relevant or reasonably calculated to lead to the discovery of admissible evidence. *See, e g*. *Export Worldwide, Ltd. v Knight*, 241 F.R.D. 259, 263 (W.D.Tex. 2006) ("The burden lies with the moving party to show clearly that the information sought is relevant to the case and would lead to admissible evidence."); *Alexander v FBI*, 186 F.R.D. 154, 159 (D.D.C 1999) ("[T]he proponent of a motion to compel discovery bears the initial burden of proving that the information sought is relevant."). KCS has failed to meet this burden, and its motion should be denied

[2] The McQuade Deposition Notice only vaguely states that KCS seeks to depose her regarding "the Application" and other "matters relating thereto." *See* Ex. 1 to CPR Motion for Protective Order. Moreover, KCS' January 25 letter and subsequent discussions between CPR counsel and KCS counsel indicated that KCS' concern centered on getting an extension of two existing KCS-IC&E agreements, not the topics it raised for the first time in its Motion to Compel.

A. KCS' Unlawful Control Allegations Are Baseless, Reckless And Irresponsible.

KCS asserts that it should be allowed to depose Ms. McQuade in order to investigate whether "CPR has exercised unlawful control of DM&E and IC&E prior to approval of the transaction." Motion to Compel at 3, 9. KCS makes this outrageous allegation without proffering a shred of supporting evidence. *See id.* As the Motion's conspicuous lack of evidence or any other support demonstrates, KCS has no legitimate grounds for making this reckless allegation. Rather, it is clear that KCS has attempted to manufacture a "control issue" in a desperate attempt to give weight to its claim that it needs to depose Ms McQuade.

CPR emphatically denies KCS' suggestion that CPR has taken any action that would support a finding that it had exercised control over DME. To the contrary, CPR has taken great care to avoid any conduct or activity that might create even an impression of possible improper control while DM&E is in a voting trust KCS cannot offer a scintilla of evidence of unlawful control by CPR, because there is none.

Indeed, the sole "evidence" in the current record bearing on this "issue" demonstrates that CPR is strictly honoring its obligation to avoid activity that might be viewed as an indirect exercise of control of DM&E. Specifically, CPR's January 29, 2008 letter responding to KCS' request for an extension of KCS-IC&E agreements expressly advised KCS that CPR could not entertain KCS' request unless and until it obtained Board authority to control DME:

> Candidly, we are somewhat confused as to why [KCS] believes that this is an appropriate time to address these issues. As you know, CPR does not yet have authority to control ICE, or to enter into agreements that bind ICE contractually.

P. Guthrie Letter to D. Reeves at 1 (Jan. 29, 2008) (Protective Order Motion Ex. 3) (emphasis added). KCS' suggestion that CPR may have exercised unlawful control of DME is further undercut by KCS' own Motion, in which KCS acknowledges that CPR advised it that (during the

time DM&E is in a voting trust) CPR would not be a party to negotiations between IC&E and KCS regarding extension of agreements between those two parties. KCS Motion at 14, n.8.

At bottom, KCS has concocted a baseless allegation of a serious violation of the Board's rules to justify a fishing expedition that KCS hopes might identify some sort of information or evidence (whether concerning unlawful control or something else) that will give it leverage in commercial discussions with DME or CPR. The Board should not countenance such abuse of its discovery process. Denying KCS' Motion and quashing the McQuade Deposition Notice would make it clear that even under the Board's "liberal" discovery rules, such unsupported allegations are insufficient to justify an untimely request for unnecessary and inappropriate discovery.

Even if questions regarding potential control of DME by CPR were an appropriate topic for discovery in this proceeding – and they are not – it would not be necessary for KCS to depose Ms. McQuade in order to pursue those questions. Indeed, KCS has not made any showing that Ms. McQuade was involved in (or would know about) any such purportedly unlawful behavior by CPR, or that she is otherwise uniquely "qualified" to testify on the subject. Moreover, on February 20, 2008, KCS will take the deposition of DME's President, Kevin Schieffer. If CPR has exercised unlawful control of DME, or otherwise improperly interfered with DME's business during the course of these proceedings, Mr. Schieffer would surely be aware of such information. Thus, KCS' specious unlawful control allegations do not support its Motion to compel the deposition of Ms McQuade.

B. Ms. McQuade Is Neither The Best Nor The Only Witness Who Can Testify Regarding The Competitive Issues KCS Raises In Its Motion To Compel.

Silently recognizing that the Board is required to approve the proposed transaction unless it finds the transaction would have anti-competitive effects (*see* 49 U.S.C. § 11324(d)), KCS' Motion raises two purported competitive issues with respect to which KCS argues,

Ms. McQuade is the only person able to provide relevant testimony. Contrary to KCS' assertions, KCS can readily explore those issues – more directly and in far greater depth – using the workpapers underlying the Application, the traffic data that Applicants prepared specially for KCS (and has already produced to it), other documents that Applicants will be producing this week in response to KCS' written discovery requests, and in KCS' depositions of other witnesses, particularly Applicants' expert witness regarding competition issues, John Williams.

First, KCS argues that the Board should compel Ms. McQuade to testify on the question of whether there currently exists competition between "UP-CPR routes" and "KCS-ICE routes" "for the movement of grain to destinations in Arkansas, Mississippi and other southern states," and any effect the proposed transaction might have on such competition. *See* KCS Motion at 3. The discovery that KCS has already obtained is more than sufficient to enable KCS to explore this theoretical issue. In response to a request from KCS' counsel, Applicants have produced to KCS 100% traffic data for all of the U S. grain traffic handled by CPR, IC&E and DM&E. That data, which identifies the routing of all IC&E and CPR grain traffic, provides definitive quantitative evidence regarding the extent (if any) to which ICE/KCS and UP/CPR routes compete for such grain shipments today.[3]

Moreover, the Verified Statement submitted by witness John Williams in support of the Application and the workpapers underlying that testimony – which have been available to KCS for more than four months – demonstrate that CPR's participation in shipments of corn (the commodity of concern to KCS) to *any* U.S. domestic destination is *de minimis*. Indeed, as verified statements of witnesses Foot and Williams show, approximately 95% of all corn traffic

[3] KCS also fleetingly mentions a desire to depose McQuade concerning "other competitive relationships," between CPR and UP. However, KCS makes no attempt to explain how any such relationships might be relevant to the Board's evaluation of the Application or any issue in this proceeding.

originated on CPR's U.S lines moves to ports for export. *See* V.S. Williams at 10; V S. Foot at 3. These data belie any assertion that the proposed transaction would result in a substantial lessening of competition between UP-CPR routes and IC&E/KCS routes for domestic corn shipments.

Applicants' expert witness, Mr. Williams, is plainly the best witness to address competitive issues concerning the proposed transaction. To the extent that the detailed traffic data produced by CPR to KCS and the verified statements of Mr Williams are not sufficient to persuade KCS that CPR is not a significant competitor for the transportation of corn to destinations in Arkansas and Mississippi, KCS can raise whatever remaining questions it might have when it deposes Mr. Williams in Washington, D.C. on February 22, 2008. Thus, despite its failure to seek discovery until the eleventh hour, KCS will have ample opportunity to depose the person with the best knowledge and expertise regarding competitive issues in the location it requested and on the date it requested. Any testimony on such matters that KCS might be able to obtain by deposing Ms. McQuade would necessarily be less complete and less detailed than, and likely duplicative of, Mr. Williams' testimony.

Second, KCS claims that it needs testimony from Ms. McQuade regarding the "competitive impact of the transaction on the contract between IC&E and KCS." *See* KCS Motion at 3, 9-10 (emphasis added). As an initial matter, it is established beyond peradventure that the Board, like the ICC before it, must consider the impact of a proposed transaction on competition, not on competitors. *See e g., Public Views on Major Rail Consolidations*, 4 S.T.B. 546, 548 n 5 (2000) ("We fully understand that our mandate is to protect competition, not particular competitors"); *Union Pacific Corp , Union Pacific R R. Co and Missouri Pacific R.R. Co. -- Control -- Chicago and North Western Transp. Co. and Chicago and North Western Ry*

Co., ICC Finance Docket No. 32133, Decision No 25, 1995 WL 141757, at *89 (served Mar. 7, 1995) ("The Commission's established policy in these matters is to protect competition, not competitors"); *Washington Corporations -- Control Exemption -- Western Transport Crane and Rigging, Inc and Montana Rail Link, Inc.*, ICC Finance Docket No. 31412, Decision, 1989 WL 239231 at *5 (served Aug. 18, 1989) ("As we frequently state, our goal is to protect competition[,] not particular competitors") (citation omitted); *Union Pacific Corp., Union Pacific R R. Co. and Missouri Pacific R.R Co Control -- Missouri-Kansas-Texas R.R. Co. et al -- Oversight Proceeding*, ICC Finance Docket No. 30800, *et al.*, Order, 1989 WL 239060, at *2 (served July 24, 1989) ("We have said on numerous occasions that we protect competition, not competitors"); 49 U.S.C. § 11324(d).

Any impact that the proposed transaction might conceivably have on the grain transportation contract between KCS and IC&E would be an impact on KCS, not on competition.[4] Even if proven, such an impact would be legally insufficient to support denial of the Application or the imposition of a condition for the benefit of KCS. Moreover, as KCS knows very well, that contract has 10 more years to run, and cannot be terminated by either party until December 31, 2017 at the earliest. *See* Guthrie Letter at 1 (Ex. 3 to Applicants' Motion for Protective Order). Thus, the proposed transaction cannot possibly have any impact on "the contract between IC&E and KCS" for at least another decade. It is impossible to predict what

[4] KCS has offered no argument or evidence to suggest that a change in its contract with IC&E would have the effect of materially reducing competition. Absent some such evidence, KCS' concern is simply that it might be negatively affected by a change in the contract, which is not a matter that Congress has authorized the Board to consider in evaluating proposed combinations of rail carriers. *See Rio Grande Indus., et al.-Pur. & Trackage Rights-CMW Ry. Co.*, 5 I.C.C.2d 952, 968 (1989) ("Our primary concern is protecting competition. Transfers of traffic among competing carriers are not grounds for rejection of a proposal or imposition of conditions unless a carrier's ability to provide essential services is threatened."); *see also-Rio Grande-Indus., Inc - Pur & Track.-Soo Line R.R. Co.*, 6 I.C.C.2d 854, 875 (1990) (to same effect).

changes may occur in the transportation market place a decade hence (for example, there may be additional rail industry consolidations that would dramatically affect the competitive landscape), let alone the effect on competition of the extension or termination of a single contract. It would be sheer speculation to claim today that if a contract is not extended ten years from today, that such non-renewal would produce anticompetitive effects – much less that such effects are the result of the proposed CPR-DME transaction. [5]

C. KCS Has Not Justified Its Late Request To Depose Ms. McQuade.

Despite having four months to serve deposition notices and other discovery requests, KCS waited to seek to commence depositions until February 19, only two weeks before the March 4 deadline for KCS to submit its evidence in this proceeding. Because of CPR Chief Operating Officer McQuade's busy schedule, KCS' delay in commencing depositions essentially guaranteed that she would not be available before that date. In defense of its delay, KCS weakly asserts that it did not serve discovery in a more timely manner because it thought it could resolve its concerns without discovery. As KCS should know, however, an assumption that pending issues will be resolved in one's favor does not excuse a failure to conduct discovery in a timely manner. *See Illinois Central R.R. Co.,– supra* at 2 (quashing depositions sought by KCS as

[5] Because questions regarding KCS' demand that Applicants extend or modify KCS-ICE agreements are not relevant or reasonably calculated to lead to the discovery of admissible evidence in this proceeding, Applicants intend to object to such questions. *See* Applicants' Motion for Protective Order at 7, n. 6. Applicants also noted that if KCS engaged in harassing questioning that Applicants regarded as unreasonably annoying or oppressive, Applicants would instruct their witnesses not to answer such questions. *See id* Of course, deposition examiners are generally allowed to ask questions – subject to objections – even if the deponent believes such questions are irrelevant. The Federal Rules provide, however, that a party may suspend a deposition (and refuse to answer further questions) if it believes questioning is being conducted "in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party . " Fed R. Civ. Pro. 30(d)(4). So long as KCS' questioning on the topic is not excessive, harassing, oppressive, or conducted in bad faith, Applicants do not intend to instruct deposition witnesses not to answer questions concerning non-privileged information.

untimely, rejecting KCS' excuse that it waited to seek discovery until after the Board declined KCS' Motion to Dismiss).

Moreover, KCS' rationale that it did not want to serve discovery until it determined whether Applicants would address its concerns does not provide an excuse for its dilatory conduct. KCS waited for four months following the October 2007 filing of the Application to raise its concerns with Applicants and to initiate attempts to resolve those concerns. There was nothing to prevent KCS from raising these concerns as early as October. Then, if discussions did not yield a result to KCS liking and it believed discovery was appropriate to further investigate its concerns, it would have had months to schedule and complete depositions.[6]

In sum, KCS has failed to meet its burden of demonstrating its entitlement to the discovery it seeks in its Motion to Compel, and the Motion should be denied. Moreover, KCS' pattern of conduct – including its eleventh hour deposition notices; its insistence on taking a duplicative deposition (despite Applicants' best efforts to schedule the depositions of three other busy witnesses who could amply cover all of the topics into which KCS seeks to inquire) of a senior CPR executive who had little involvement in the transaction or in preparing the Application; its wholly unsubstantiated accusation that CPR may be exercising unlawful control of DME; and its threat to serve further (and even more untimely) deposition notices on other senior CPR executives if the Board denies its ill-conceived Motion to Compel (*see* KCS Motion at 3, n.3) – constitute harassment of CPR and an abuse of the Board's discovery process and the entire regulatory review process. The Board should not countenance such abuse. Instead, it should deny the Motion to Compel, grant Applicants' Motion for Protective Order, adhere to the

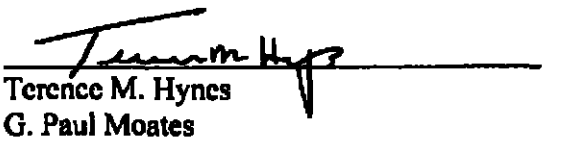
[6] Even after KCS learned on January 29, 2008 that CPR did not believe it was prudent or appropriate to discuss extension of the KCS-IC&E agreements at this juncture, it still did not act with alacrity. Instead, it delayed commencing depositions for three weeks, noticing the first deposition for February 19, 2008.

current procedural schedule and deny any KCS request for an extension or leave to make a supplemental filing attributable to KCS' tardy and abusive discovery tactics.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that the Board deny KCS' Motion to Compel the testimony of Ms. McQuade.

Respectfully submitted,



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Dated: February 19, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Reply In Opposition to Kansas City Southern Railroad Company's Motion to Compel the Deposition of Kathryn McQuade to be served by first class mail, postage prepaid, this 19th day of February 2008, on all parties of record and the following persons as specified in the Board's Decision dated December 27, 2007:

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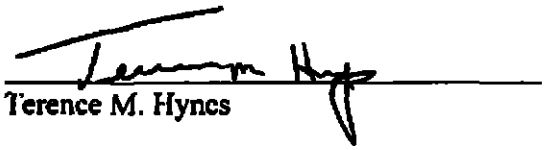

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